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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

JESUS ROBERTO FLORES, Plaintiff and Appellant, v. GREYHOUND LINES, INC. et al., Defendants and Respondents.	B174243 (Los Angeles County Super. Ct. No. BC275354)

APPEAL from a judgment of the Superior Court of Los Angeles County. David A. Workman, Judge. Affirmed.

Law Offices of Bennett Rolfe & Associates and Bennett Rolfe for Plaintiff and Appellant.

Seyfarth Shaw, F. Scott Page and Brian J. Kramer for Defendants and Respondents.

Plaintiff and appellant Jesus Flores appeals from a judgment entered after summary judgment was granted in favor of defendants and respondents Greyhound Lines, Inc. and Sistema International De Transporte De Autobuses, Inc. (SITA) in this wrongful termination action. Flores worked as a bus driver for a company that is partly owned by SITA. SITA, in turn, is a subsidiary of Greyhound. On appeal, Flores contends: (1) Greyhound and SITA waived evidentiary objections by failing to obtain specific rulings on their objections; (2) triable issues of fact exist as to whether Greyhound and SITA were the alter egos of the company that employed Flores; and (3) the trial court abused its discretion by denying leave to file an amended complaint. We affirm.

FACTS

SITA is a wholly owned subsidiary of Greyhound. All of SITA's officers and directors also serve as officers of Greyhound. SITA invests in bus carriers that provide passenger transportation services between Mexico and destinations in the United States.

Gonzalez, Inc., doing business as Golden State Transportation (Gonzalez), is one of the bus carriers in which SITA invested. The shareholders of Gonzalez are as follows: SITA owns 51.4 percent; the Francisco and Josefa Gonzalez Family Partnership, L.P., owns 34.6 percent; and Crucero International de Transporte, S.A. de C.V. owns 14 percent. Gonzalez hired Flores as a bus driver in 1997 and terminated his employment in June 2001.

During the relevant time period, Gonzalez's board of directors consisted of seven directors: three directors who did not serve in any capacity for SITA or Greyhound; two directors who also served as officers and directors of SITA and officers of Greyhound; and two directors who also served as officers of Greyhound. Gonzales had eleven officers: seven of the offices were held by persons who did not serve in any capacity for SITA or Greyhound; and four of the offices were held by persons who served as officers

or directors, or both, of SITA and Greyhound. In addition, Greyhound loaned employee Edwin Patterson to Gonzalez during the relevant time period.

On December 12, 2001, Gonzalez and 33 individuals, including Patterson, were indicted by the United States Government for transporting and harboring illegal aliens.

PROCEDURAL BACKGROUND

On June 7, 2002, Flores filed a complaint against Gonzalez and a manager employed by Gonzalez for defamation, Labor Code violations for failure to reimburse expenses and pay overtime, and wrongful termination in violation of public policy as a result of complaints Flores made concerning the Labor Code violations. On December 9, 2002, Gonzalez filed for bankruptcy pursuant to Chapter 11 of the Bankruptcy Code.[1] Flores filed amendments to his complaint, naming Greyhound and SITA as Doe defendants. On July 21, 2003, Greyhound and SITA filed a motion for summary judgment on the grounds that they had not employed Flores and could not be held liable under the alter ego doctrine for acts of Gonzalez. On August 14, 2003, Flores filed a substitution of new counsel.

On September 23, 2003, Flores filed an opposition to the motion for summary judgment. Flores also filed a motion to amend his complaint to state that Greyhound and SITA were the alter egos of Gonzalez. The sole cause of action alleged in the proposed amended complaint was wrongful termination in violation of public policy, based on Flores's complaints concerning the failure to reimburse expenses and Flores's refusal to transport illegal aliens. In connection with the motion to file an amended complaint, Flores's attorney filed a declaration stating that the request could not have been made earlier because it was not until August 2003 that he became counsel for Flores and

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[1] Apparently, Gonzalez's bankruptcy has been converted to a petition under Chapter 7 of the Bankruptcy Code. Neither Gonzalez nor the Gonzalez manager are parties on appeal.

discovered the additional factual basis for the wrongful termination action, as well as the evidence to support alter ego allegations.

On October 15, 2003, Greyhound and SITA opposed the motion to amend the complaint on the grounds that it was untimely and failed to state a basis for liability against either of them. Greyhound and SITA also filed a reply to the opposition to the motion for summary judgment and objections to the evidence Flores had submitted in support of his opposition to the motion for summary judgment. The trial court vacated the November 3, 2003 trial date and reset the trial date for January 12, 2004.

On December 11, 2003, the trial court issued tentative rulings denying the motion to amend the complaint as untimely and procedurally defective; sustaining Greyhound and SITA's evidentiary objections; and granting the motion for summary judgment. The parties submitted the case for disposition based on the tentative rulings. On January 8, 2004, the trial court entered an order granting the motion for summary judgment. That day, the trial court entered judgment in favor of Greyhound and SITA. Flores filed a timely notice of appeal.

DISCUSSION

Standard of Review

"A trial court properly grants summary judgment where no triable issue of material fact exists and the moving party is entitled to judgment as a matter of law. [Citation.] We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. [Citation.] In the trial court, once a moving defendant has 'shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established,' the burden shifts to the plaintiff to show the existence of a triable issue; to meet that burden,

the plaintiff 'may not rely upon the mere allegations or denials of its pleadings . . . but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action . . . .'" (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477.)

Evidentiary Objections

Flores contends Greyhound and SITA failed to obtain specific rulings on their evidentiary objections, and therefore, the objections have been waived. This is incorrect.

Where evidentiary objections were filed in the superior court, but the record contains no rulings on those objections, the objections are ordinarily deemed waived and the objected-to evidence is considered in reviewing the ruling on the motion. (*Vineyard Springs Estates v. Superior Court* (2004) 120 Cal.App.4th 633, 642-643; *Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 140.) Similarly, when the superior court does not rule on evidentiary objections and simply states that it considered only admissible evidence, the appellate court deems any objection not specifically sustained to have been waived or impliedly overruled. (*Alexander v. Codemasters Group Limited*, *supra*, 104 Cal.App.4th at p.140; *Sambrano v. City of San Diego* (2001) 94 Cal.App.4th 225, 238; but see *Biljac Associates v. First Interstate Bank* (1990) 218 Cal.App.3d 1410, 1419.)

However, in this case, the trial court ruled on Greyhound and SITA's evidentiary objections. The objections were sustained. This is not a case in which the trial court failed to rule on the objections or simply stated that only admissible evidence had been considered. Generally, a trial court's rulings on evidentiary objections are reviewed for abuse of discretion. (*Alexander v. Codemasters Group Limited*, *supra*, 104 Cal.App.4th at p. 140, fn. 3.) However, Flores has not challenged the trial court's ruling as to any particular evidence. As a result, any issues concerning the correctness of the trial court's

evidentiary rulings have been forfeited and we consider all such evidence to have been properly excluded. (*Lopez v. Baca* (2002) 98 Cal.App.4th 1008, 1014-1015.)

Alter Ego

Flores contends triable issues of fact exist as to whether Greyhound or SITA, or both, were the alter egos of Gonzalez. We disagree.

"Ordinarily, a corporation is regarded as a legal entity, separate and distinct from its stockholders, officers and directors, with separate and distinct liabilities and obligations." (*Sonora Diamond Corp. v. Superior Court* (2000) 83 Cal.App.4th 523, 538.) However, " '[a]s the separate personality of the corporation is a statutory privilege, it must be used for legitimate business purposes and must not be perverted. . . .' [Citation.]" (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300.) "A corporate identity may be disregarded—the 'corporate veil' pierced—where an abuse of the corporate privilege justifies holding the equitable ownership of a corporation liable for the actions of the corporation. [Citation.] Under the alter ego doctrine, then, when the corporate form is used to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose, the courts will ignore the corporate entity and deem the corporation's acts to be those of the persons or organizations actually controlling the corporation, in most instances the equitable owners. [Citations.] The alter ego doctrine prevents individuals or other corporations from misusing the corporate laws by the device of a sham corporate entity formed for the purpose of committing fraud or other misdeeds. [Citation.]" (*Sonora Diamond Corp. v. Superior Court*, *supra*, 83 Cal.App.4th at p. 538.)

Two general requirements must be met before the alter ego doctrine will be invoked: (1) there must be such unity of interest and ownership that the separate personalities of the corporation and the shareholder do not in reality exist, and (2) the result will be inequitable if the acts are treated as those of the corporation alone. (*Sonora Diamond Corp. v. Superior Court*, *supra*, 83 Cal.App.4th at p. 538.) "'[O]nly a

difference in wording is used in stating the same concept where the entity sought to be held liable is another corporation instead of an individual.' [Citation.]" (*Mesler v. Bragg Management Co.*, *supra*, 39 Cal.3d at p. 300.) The corporate form of one company will be disregarded when """"it is so organized and controlled, and its affairs are so conducted, as to make it merely an *instrumentality, agency, conduit, or adjunct of another corporation*." [Citations.]' [Citation.]" (*Las Palmas Associates v. Las Palmas Center Associates* (1991) 235 Cal.App.3d 1220, 1249.)

The court may look to a number of factors to determine whether there is the requisite unity of interest and ownership, although no one factor is determinative. (*Sonora Diamond Corp. v. Superior Court*, *supra*, 83 Cal.App.4th at p. 539.) " 'Among the factors to be considered in applying the doctrine are commingling of funds and other assets of the two entities, the holding out by one entity that it is liable for the debts of the other, identical equitable ownership in the two entities, use of the same offices and employees, and use of one as a mere shell or conduit for the affairs of the other.' [Citations.] Other factors which have been described in the case law include inadequate capitalization, disregard of corporate formalities, lack of segregation of corporate records, and identical directors and officers." (*Id*. at pp. 538-539.)

Under the "single-enterprise" theory, courts have applied the alter ego doctrine to hold related entities liable where a single business enterprise has been divided into artificial segments in order to manipulate the assets and liabilities of the enterprise. (2 Marsh's Cal. Corporation Law (4th ed. 2000) § 16.06, p. 16-84.) "The operating portion of the business, which is likely to incur the liabilities, has been placed in one entity and a major portion of the assets have been retained by the shareholders or placed in a separate entity in an attempt to immunize them from the claims of creditors." (*Ibid*.) "In the simplest form of this maneuver, the shareholder transfers to a corporate entity which is to conduct the business a minimum amount of operating assets and a minimum amount of capital, but retains all of the fixed assets used in the business and leases them to corporation. The lease has a provision that it can be terminated in the event of the

insolvency or bankruptcy of the corporation. Thus, the shareholder attempts to retain a string on the major assets actually used in conducting the corporate business, with which he can jerk these assets out of the corporation in the event of trouble and leave the creditors holding an empty sack." (*Id*., pp. 16-84 to 16-85.)

"Alter ego is an extreme remedy, sparingly used." (*Sonora Diamond Corp. v. Superior Court*, *supra*, 83 Cal.App.4th at p. 539.) "[T]he corporate form will be disregarded only in narrowly defined circumstances and only when the ends of justice so require." (*Mesler v. Bragg Management Co.*, *supra*, 39 Cal.3d at p. 301.) "The alter ego doctrine does not guard every unsatisfied creditor of a corporation but instead affords protection where some conduct amounting to bad faith makes it inequitable for the corporate owner to hide behind the corporate form. Difficulty in enforcing a judgment or collecting a debt does not satisfy this standard." (*Sonora Diamond Corp. v. Superior Court*, *supra*, 83 Cal.App.4th at p. 539.)

In this case, there was no evidence of any wrongdoing by Greyhound or SITA. The equitable ownership of Gonzalez was not identical to that of SITA or Greyhound. Only two of the seven Gonzalez directors were officers and directors of SITA, and a simple majority of Gonzalez's directors were officers of Greyhound. The vast majority of Gonzalez's officers did not serve in any capacity for SITA or Greyhound, and only one Greyhound employee was loaned to Gonzalez. It is common for related companies to share overlapping directors and officers. These facts alone do not show such unity of interest and ownership between the corporations that a trier of fact could find the separate personalities of Gonzalez and the other companies did not in reality exist. Furthermore, there was no evidence of: inadequate capitalization; manipulation of assets and liabilities between the corporations, such as by failing to provide the fixed assets necessary for Gonzalez's operations; disregard of corporate formalities; commingling of funds or assets; holding out by Greyhound or SITA that it was liable for the debts of Gonzalez; or use of the same offices. There was no evidence that SITA or Greyhound used Gonzalez as a mere shell or conduit for the affairs of the parent companies.

In addition, there was no evidence that injustice would flow from the recognition of Gonzalez's separate corporate identity. Flores's inability to collect a judgment from Gonzalez was not the result of bad faith on the part of Greyhound or SITA such that it would be inequitable to permit the parent companies to assert Gonzalez's corporate form. Without any evidence of wrongdoing or injustice, the alter ego doctrine cannot be invoked.[2]

Leave to File Amended Complaint

Flores contends that the trial court abused its discretion in denying him leave to file an amended complaint. We disagree.

A motion to amend a pleading before trial must include a copy of the proposed amendment or amended pleading and state the allegations in the previous pleading that are proposed to be deleted or added, including the location of the deletions or additions by page, paragraph, and line number. (Cal. Rules of Court, rule 327(a).) In addition, the

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[2] In his reply brief, Flores contends for the first time that the "single employer" doctrine applies in this case. Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.) Moreover, it does not appear that the "single employer" doctrine applies. The "single employer" doctrine developed in labor law: (1) to prevent employers from escaping collective bargaining obligations by shifting work to nonunion firms that they also own (*UA Local 343 v. Nor-Cal Plumbing, Inc.* (9th Cir. 1995) 48 F.3d 1465, 1469-1470); and (2) to prevent one entity from being structured so as to control another and, at the same time, avoid obligations imposed under the Federal Worker Adjustment and Retraining Notification Act (WARN) Act (29 U.S.C. § 2101-09). (Friedman, Cal. Practice Guide: Corporations (The Rutter Group 2004) ¶¶ 2:52.10 to 2:52.14, pp. 2-31 to 2-32.) Neither collective bargaining obligations nor the WARN Act are at issue in this case. Flores's contention that the court in *Las Palmas Associates v. Las Palmas Center Associates, supra*, 235 Cal.App.3d at pages 1249-1250, adopted the "single employer" doctrine is simply incorrect. No employment issues were raised in *Las Palmas*. Rather, the *Las Palmas* court recognized the "single-enterprise" theory as a basis for traditional alter ego liability under corporate law.

party requesting leave to amend must file a separate declaration that specifies: "(1) The effect of the amendment; [¶] (2) Why the amendment is necessary and proper; [¶] (3) When the facts giving rise to the amended allegations were discovered; and [¶] (4) The reasons why the request for amendment was not made earlier." (Cal. Rules of Court, rule 327(b).)

"The trial court, 'in furtherance of justice,' may allow amendment of a pleading. [Citation.] Although there is a strong policy in favor of liberal allowance of amendments, the trial court's discretion will not be disturbed on appeal unless it clearly has been abused. [Citation.] Of course, if the proposed amendment fails to state a cause of action, it is proper to deny leave to amend. [Citation.]" (*Foxborough v. Van Atta* (1994) 26 Cal.App.4th 217, 230.) "In denying leave to amend, the trial court may properly consider whether the subject matter of the amendment is objectionable, the conduct of the moving party, and the belated presentation of the amendment." (*Del Mar Beach Club Owners Assn. v. Imperial Contracting Co.* (1981) 123 Cal.App.3d 898, 914.)

In this case, Flores requested leave to file an amended complaint approximately one month before the scheduled trial date that alleged an entirely new factual basis for Flores's wrongful termination claim, namely, that he was terminated for refusing to transport illegal aliens. The motion for leave to amend was procedurally defective because it failed to set forth with the required specificity the allegations proposed to be deleted from or added to the operative complaint. Moreover, the declaration of Flores's counsel did not explain the delay in requesting leave to amend, other than to state that as new counsel for Flores, he had only recently learned of the facts. Flores's refusal to transport aliens during his employment and his termination on that basis were facts known to Flores at the time the original complaint was filed. In addition, the complaint had been amended to name Greyhound and SITA as Doe defendants several months prior to Flores's substitution of counsel. No explanation was provided for the delay in requesting leave to amend to allege the factual basis for their liability. On appeal, Flores contends that he requested leave to amend primarily to incorporate the alter ego

allegations that were at issue in the summary judgment motion. However, as discussed above, summary judgment was properly granted on the ground that no triable issue of fact existed as to alter ego. It would have been highly prejudicial to Greyhound and SITA to allow Flores to file an amended complaint that simply avoided the summary judgment motion due to be ruled upon. The trial court did not abuse its discretion in denying Flores's request to file an amended complaint.

DISPOSITION

The judgment is affirmed. Respondents Greyhound Lines, Inc. and Sistema International De Transporte De Autobuses, Inc. are awarded their costs on appeal.

NOT TO BE PUBLISHED.

KRIEGLER, J.*

We concur:

TURNER, P. J.

MOSK, J.

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* Judge of the Superior Court for the Los Angeles Judicial District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.